HALLETT MCCANN LAW GROUP
WHEN YOUR BUSINESS TRANSCENDS BORDERS

For our *Immigration Thought of the Week*, Beata and I [Jennifer] decided to focus our attention on Covid-19 issues which are immediately impacting H-1B employees and their employers alike. Below, you will find a list of the most common questions we are being asked, along with our specific advice on each topic. As a side note, please understand that immigration attorneys, like many other professionals, often differ in opinion and/or strategy. We, at Hallett McCann Law Group, will typically err on the side of caution, preferring a more conservative approach to immigration compliance and maintenance of status. With that said, here are our top eleven (11) Covid-19 questions and answers:

Can H-1B employees be furloughed under Covid-19?

No. Under the H-1B program, an employer must file and secure a certified Labor Condition Application (LCA) before filing an H-1B petition. When signing an LCA, the employer attests that they will pay the H-1B employee the higher of the following:

1. The "actual wage" paid to similarly situated employees; or
2. The "prevailing wage" for that occupation within the geographic area of intended employment.

Employers are required to pay the wage as determined above for the duration of the approved H-1B petition or until there is a bona fide termination. As such, an H-1B employee placed on furlough must be paid at least the required wage for the duration of the furlough.

What obligations does an employer have to foreign national employees following termination?

The termination of an H-1B employee levies certain obligations on the employer to: (1) withdraw the approval of the visa with the United States Citizenship and Immigration Services (USCIS); and (2) offer the H-1B worker return transportation home. Failure to complete these steps within a reasonable time may result in the employer owing back wages and additional compensation to the employee.

What happens to H-1B workers if they are terminated during Covid-19?
Federal regulations allow H-1B or TN nonimmigrant workers a grace period of up to 60 days based upon a cessation of their employment. The length of the grace period is either 60 consecutive days or until the end of the worker's current authorized validity period, whichever is shorter. The grace period not only gives the worker more time to leave the United States, but it also provides a window of opportunity to potentially find other employment with an employer who can file an extension or change of status within the 60-day period. Similarly, the worker could also potentially change to some other status on his or her own during the grace period, such as to F-1, after enrolling in a school.

An employer would be able to rehire a foreign national employee before the grace period expires. As previously confirmed, the employer should have withdrawn the petition from USCIS upon termination to avoid wage liability. Thus, a new petition would be required, and the employee would not be able to begin employment until the new petition is approved.

Can the H-1B employment be changed from full-time to part-time employment?
Yes, though this would require the employer to file an amended petition with USCIS before the change could occur. Changing from full-time to part-time employment is considered a material change triggering the requirement of a new LCA and an amended petition.

Can H-1B nonimmigrants work remotely?
In response to the Covid-19 pandemic, many employers are requiring employees to work from home, to encourage social distancing and to comply with various state and government mandates.

The H-1B program is regulated by both USCIS and DOL. DOL regulations require employers to submit a certified LCA for each location at which the H-1B employee will be working. A key DOL requirement is the provision of notice to U.S. workers that an H-1B worker is being hired. Pursuant to the federal regulations, the notice can be provided

either through a hard-copy posting at the actual worksite(s) where the H-1B worker will be employed, or through electronic notice. The electronic notice may be on the company's website, intranet, newsletter, or e-mail to affected employees.

If the worksite location changes or additional worksites are necessary, a new LCA must be certified *only if the new location is outside of the original intended area of employment*. DOL guidance has steadfastly indicated that the employer need not file a new LCA for the worksite if it is within the same metropolitan statistical area (MSA) or "area of intended employment. An MSA is defined by certain counties linked together into a specific MSA. An "area of intended employment" is defined as "the area within normal commuting distance of the place where the H-1B nonimmigrant is assigned." There is no rigid test or measurement of distance which constitutes a normal commuting distance, because there may be widely variable factual circumstances among different areas (e.g., normal commuting distances might be 10 miles by bus, 20 miles by car, 40 miles by train, etc. As such, if the H-1B worker's home is within the same MSA or area of intended employment as the employee's normal worksite location, a new LCA is not required for the new worksite location. Attorney opinions differ on the posting requirement at an H-1B's private residence, citing the absurdity of the requirement. However, the strict letter of the regulation requires it, and many employers may opt to forward the LCA to the employee's home and have them post for ten consecutive business days, and then add the posting notice to the Public Access File when taken down.

If the employee's home is outside the MSA or area of intended employment in which his or her worksite is located, then the following rules apply:

- Under Short-Term Placement rules, regulations permit H-1B employers to place H-1B workers at a worksite not listed on its approved LCA for up to 30 workdays each year. Such placement may be for an additional 30 workdays, but for no more than 60 workdays, in a one-year period, where the employer can show that the H-1B nonimmigrant maintains ties to the permanent worksite. Please be aware that the workday limit is in the aggregate for the calendar year. Workdays

are days actually worked and do not include weekends and holidays. Short-Term Placement could therefore typically cover at least 6 weeks of work at a temporary location.

Can terminated H-1B workers seek unemployment benefits?

No. Foreign national employees employed pursuant to an H-1B nonimmigrant visa cannot claim unemployment benefits because they will not be considered available for work, as their employment authorization subjects their employment to a specific employer.

Can a terminated H-4 EAD spouse seek unemployment benefits?

On the other hand, unemployment benefits may be available for an H-4 spouse with an Employment Authorization Document if the H-1B spouse remains in status. The H-4 spouse's ability to work in the future is linked to the H-1B status of the spouse, not the employer, and if the H-4 spouse is terminated, s/he would be available for work if the H-1B spouse continues to maintain their H-1B status. The same likely holds true for those in F-1 (student) status who possess an Employment Authorization Document.

Remember, unemployment benefits are guided by state rules, so check with your particular state regarding eligibility to make such a claim.

A quick word of caution from Hallett McCann Law Group-- If H-4 spouses or F-1 students claim unemployment benefits, this act could potentially lead to negative implications in the employee's green card process. Recently, the Trump Administration has been busy revamping public charge definitions for green card processing. During 2020, USCIS has sought to expand the number of benefits applicable to the green card public charge analysis. Right now, state unemployment is not classified as a public benefit since, theoretically, one has earned unemployment insurance by contributing to it while employed. However, it is not altogether unlikely that unemployment will see itself subject to analysis as a public benefit, given the immense cost of Covid-19 relief to the U.S. government. Our advice to our clients? We always recommend erring on the

side of safety, which means H-4s and F-1s should forego unemployment benefits if at all possible.

How has international travel been impacted for H-1Bs?
Numerous countries, including the United States, have implemented travel advisories and travel bans to and from certain regions of the world as the pandemic has progressed. The ban does not apply to U.S. citizens or lawful permanent residents.

In addition, the following international travel restrictions have been put in place by the United States:

- Trusted Traveler Program operations suspended until at least September 8, 2020 due to the COVID-19 pandemic. This temporary closure includes all public access to Global Entry, NEXUS, SENTRI, and FAST enrollment locations.

- Closing of the northern and southern U.S. Borders - On Wednesday, March 20, the United States and Canada announced that the border between the two countries would be closed to "nonessential" travel. Nonessential travel is currently defined as "travel that is considered tourism or recreational in nature." This decision was implemented at midnight, March 21, 2020, and currently in effect until September 21, 2020.

How can companies comply with I-9 regulations when workforce is remote?
On March 20, 2020, due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security (DHS) announced that it will defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA).

Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the

Section 2 documents remotely (e.g., over video link, fax or email, etc.), and obtain and retain copies of the documents, within three business days for purposes of completing Section 2. Once normal working activities resume, physical inspection of the documents must take place. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection has occurred. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 Additional Information field on the Form I-9, or to Section 3 as appropriate.

This relief provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification.

Is Premium Processing service available again?

On May 29, 2020, USCIS announced that it would resume premium processing for Form I-129 and Form I-140.

Are there any other impacts that the pandemic is having on immigration?

Yes, USCIS has indicated that as they continue to reopen immigration services, offices will reduce the number of appointments and interviews to ensure social distancing, allow time for cleaning, and reduce waiting room occupancy. Appointment notices will contain information on safety precautions that visitors to USCIS facilities must follow. Clearly, these new precautions will lead to additional delays in USCIS in-person interviews and processes.